86-102

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1986

MARK LEWIS SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MESHBESHER, SINGER & SPENCE, LTD.

Ronald I. Meshbesher
Counsel of Record
John P. Sheehy
1616 Park Avenue
Minneapolis, Minnesota 55404

Counsel for Petitioner

1986 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518

QUESTIONS PRESENTED

The Petitioner's first conviction was reversed for judicial misconduct. Before the second trial, the U.S. Attorney revealed it had acquired and read a confidential file stolen from the Petitioner's attorney. The U.S. Attorney, his assistants, the Chief Federal District Judge, the Police Chief, and a DEA agent publicly, and falsely, claimed the file showed that the attorney had suborned perjury in the trial. Privately, before the accusations were made, both the U.S. Attorney and F.B.I. concluded that the stolen file did not support this claim and so informed the Chief Judge. Because of these accusations, the Petitioner's privately retained counsel of choice withdrew from the second trial. The questions presented are:

I.

WHEN THE GOVERNMENT WRONGFULLY INTERFERES WITH A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHTS, THEREBY DEPRIVING HIM OF LONG-STANDING, PRIVATELY RETAINED COUNSEL OF CHOICE AND FORCING ACCEPTANCE OF APPOINTED COUNSEL, IS PREJUDICE PRESUMED OR IS THE ERROR HARMLESS ABSENT A SHOWING THAT THE REPLACEMENT COUNSEL WAS INEFFECTIVE?

II.

DOES THE DOUBLE JEOPARDY CLAUSE BAR RETRIAL OF A DEFENDANT AFTER HIS CONVICTION IS REVERSED FOR JUDICIAL MISCONDUCT, AND EVIDENCE SHOWS THE MISCONDUCT WAS MOTIVATED BY A DESIRE TO SECURE THE DEFENDANT'S CONVICTION?

LIST OF ALL PARTIES BELOW

United States v. Mark Lewis Singer and John Patrick Reynolds.

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MARK LEWIS SINGER,

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Appeals for the Eighth Circuit

The petitioner, Mark Lewis Singer, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 26, 1986.

REPORTS OF OPINIONS BELOW

The most recent opinion of the Eighth Circuit which the petitioner is seeking to have this Court review is reported at 785 F.2d 228 (8th Cir. 1986) (A.1-74).

The previous opinions of the Eighth Circuit are reported at 710 F.2d 431 (8th Cir. en banc 1983) (A. 76-105) and 687 F.2d 1135 (8th Cir. 1982).

The trial court's memoranda are not published but are reproduced in the Appendix at A. 106-180.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 26, 1986. A timely petition for rehearing en banc was denied on May 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United

States Constitution provides in pertinent part:

... [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...

The Sixth Amendment to the United Stastes Constitution provides in pertinent part:

... In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals, sitting en banc, reversed the petitioner's conviction for judicial misconduct. United States v. Singer, 710 F.2d 228, 431 (8th Cir. 1983) (en banc). Throughout the first trial, the District Court Judge, the Honorable Miles W. Lord, interrupted counsel, helped the prosecutor, and so far interjected himself into the proceedings so as to deprive the petitioner of a fair trial.

After the reversal, the trial judge acknowledged helping the prosecutor and told the press:

> People shouldn't be found innocent because of a disparity in their representation.

quoted in United States v. Singer, 785 F.2d 228, 230 n. 2 (8th Cir. 1986).

While preparing for the retrial, Singer's privately retained counsel, Ron-

ald Meshbesher, who had represented him in the first trial and secured the reversal, received a package from the U.S. Attorney containing copies of fifty-six confidential defense documents consisting of both attorney-client communications and attorney work product -- the core of the defense investigation file.[1] The cover letter stated that the file had come into the government's possession from a non-government source and it would not be used in the case-in-chief in the retrial. The U.S. Attorney refused to tell Meshbesher how he had obtained the documents (9/14/-83, p. 11).

On September 14, the day the retrial was to begin, Singer moved for an order to dismiss the indictment for prosecutorial

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[1]For example, the package contained copies of the following documents: The Case For Mark Singer; Aliases re: United States v. Singer; Response To "The Case Against Mark Singer"; and numerous letters from Mark Singer discussing witnesses, aliases, and exhibits.

and judicial misconduct and on double jeopardy grounds based on the misconduct. In response, the government submitted a vague affidavit of Ron Johnson, the case agent, which stated he had received the documents from an informant who told him the documents "would establish the commission of a crime collateral to the main investigation." (See Affidavit of Ron Johnson).

Meshbesher pressed for the name of the person who had given the government his client's file. The U.S. Attorney's office claimed that the name of the person who procured the file -- the informant -- was privileged and would not be revealed (9/14/83, p. 14). Also, the government maintained it had no duty to return the documents, but did so only gratuitously (Id. at 16).

In camera, Johnson told Judge Murphy that he had received the files from Marshall Stoll, a fugitive and co-defendant

of Mark Singer (In camera, 9/14/83, pp. 3, 5, 20). Stoll had been a fugitive during the first trial. Johnson said Stoll told him an employee in Meshbesher's office had photocopied the documents and given them to her boyfriend, who in turn gave them to Stoll. Johnson then gave them to, Asst. U.S. Attorney Dan Schermer (Id. at 8-16).

Johnson also said he showed Stoll a transcript of Gilbert Singer's trial testimony. (Gilbert Singer is Mark Singer's father, who was a witness for Singer in the first trial) and that Stoll said, "This is complete perjury and I can prove it." Johnson asked him how and Stoll replied, "I have documents from ... Meshbesher's files that will show that." (In camera, 9/14/83, p. 7).

Meshbesher was not allowed to inquire how the "informant" got the documents. The government's assertion of the informant privilege was sustained and

Stoll's name was not disclosed to the defense.

Chief Judge Lord, the U.S. Attorney and Police Chief Insinuate that Meshbesher Suborned Perjury Prior to September 16, 1983 Hearing

The next day, the Minneapolis Star & Tribune published a front-page article concerning the Singer files, quoting the U.S. Attorney, who insinuated that Meshbesher had acted improperly in the first trial. He told the press, "We wanted the public to see it [the file] ... It might be an indication why some one would produce it for us." (See Minneapolis Star & Tribune article dated 9/15/86).

Then, on September 16, 1983 the Minneapolis Star & Tribune published a second front-page article entitled: **"FILE PROMPTS BOUZA, LORD TO QUESTION MESHBESHER CONDUCT."** Minneapolis Police Chief Anthony Bouza and Chief Judge Lord were quoted as saying the documents showed that

Meshbesher had allowed a witness to perjure himself (See Minneapolis Star & Tribune article dated 9/16/83). Incredibly, both Lord and Bouza acknowledged they had not even read the documents. Nevertheless, Chief Judge Lord was quoted as saying he told the U.S. Attorney "in my opinion an outside prosecutor should be brought in to review the case ... I thought there was enough here to have someone from the outside come in ..." (Id.)

Further, Bouza told the press that the documents had been leaked by one of Meshbesher's employees. This was the first hint of how the documents were procured. Also, Bouza said Johnson took the documents to Judge Lord because "there was not much interest" in the U.S. Attorney's office (Id.)

These newspaper articles clearly set the tone and agenda for the hearing on September 16, 1983. The government attor-

neys insinuated throughout the hearing that Meshbesher was simply attempting to discover the facts of the government's investigation into his behavior rather than discover the source of the leak in his office and vindicate his client's rights.

Again, Asst. U.S. Attorney Lee said the government had acted properly in taking the documents, and "it is a fact of life that this happens with regularity and that it is approved by the courts." (9/16/-83, pp. 13-14).

Lee also argued that Meshbesher's purpose in having the hearing was directly "out of his concern for himself." (Id. at 25, see also 14). Meshbesher questioned Dan Schermer, the Asst. U.S. Attorney who received the documents from Johnson. While being examined as a witness, even Schermer objected to questions on the basis that the answers might reveal infor-

mation about a "potential criminal case." (9/16/83, p. 34).

Judge Lord's Improper Ex Parte Request to the Prosecutor to Bolster the Record for Appeal

Additionally, Meshbesher asked Schermer if he had ever had an ex parte contact with Judge Lord concerning Mark Singer's case. Schermer admitted that while Singer's motion for a new trial was pending, Judge Lord had called him to his chambers and told him to prepare a memorandum and an affidavit to file with the court to strengthen the record for appeal (Id. at 51-55). Schermer complied with Lord's advice and submitted an affidavit which was later considered on appeal. Schermer had one other ex parte contact with Judge Lord, after the verdict but before sentencing, where he and Judge Lord speculated about whether a co-defendant was alive (11/3/83, p. 15, 20). Johnson

was apparently present during both ex parte contacts (Id. at 21-25).

After the government's insinuations and front-page articles, Meshbesher began to feel he had to almost defend himself in the proceedings. He requested permission to withdraw as trial counsel. He told the court he could not effectively represent the defendant in view of the newspaper allegations and the "threat of prosecution" hanging over his head (9/16/83, pp. 55-56). Asst. U.S. Attorney Noel demanded the petitioner's consent on the record (Id. at 65). The petitioner reluctantly agreed to Meshbesher's withdrawal as trial counsel because of "his conflict position" that had arisen in the last seven days, (Id. at 64), but only on the condition that Meshbesher continue to represent him on the motion to dismiss the indictment (Id. at 50, 67).

Judge Lord's Letter to Judge Murphy and His Comments to the Press: September 20, 1983 Hearing

On September 20, 1983, Judge Lord wrote directly to Judge Murphy and offered to testify. He also disparaged the defense counsel stating:

> "It has been my experience that defense counsel in criminal cases are much more interested in questions than in answers." (9/20/83, p. 4).

Judge Lord had also continued to discuss the case with both newspaper and television reporters. On the evening of September 16, 1983, he said in a television interview that Meshbesher was "in trouble" and just trying to "make hay" with him (Id. at 6).

The Asst. U.S. Attorneys continued to indicate that Meshbesher had a conflict with his client because of his "personal concerns." Asst. U.S. Attorneys Lee and Noel demanded that Singer waive any conflicts or the government would move to

disqualify Meshbesher (9/20/83, p.32).

Noel stated:

> If Mr. Singer, after consulting with Mr. Meshbesher, is not willing to waive, that is, by colloquy, to place on the record a knowing, intelligent, voluntary waiver of the conflict of interest which the government feels is apparent on its record, the government would have a motion to disqualify Mr. Meshbesher from further representations of Mr. Singer on the motion to dismiss. Just so it's clear that that's the government's position. (9/20/83, p. 32). (emphasis added).
>
> * * *
>
> [T]he government is not in a position to discuss with you [Mr. Singer] anything it may or may not know about your attorney. Do you understand that anything which may subsequently come to light about this conflict is in no way going to be a ground for you to move for any kind or relief based on ineffective assistance of counsel ...? (9/20/83, pp. 35-36) (emphasis added).

Singer replied that he would like Meshbesher to continue as his attorney

because he knew the case so well (Id. at 34).

Meshbesher asked the government to disclose anything which could cause a conflict of interest between him and Singer because he personally did not know of anything (9/20/83, p. 39). Meshbesher said that he felt he had to withdraw not because of a conflict but rather because the government's insinuations would chill his zealous representation of Singer at trial. He did not believe he had an actual conflict based on his conduct because he had done nothing wrong (Id. at 38-41). The Asst. U.S. Attorneys refused to supply any information specifying the conflict (Id.).

The Private Conclusions of the U.S. Attorney and the F.B.I.

Documents made part of the record by the Eighth Circuit show that the private conclusions the U.S. Attorney had reached were much different than the public accusa-

tions and insinuations being made. Before the public accusations against Meshbesher, before the Asst. U.S. Attorneys claimed Meshbesher was conducting the hearing because of his personal concerns, before the Asst. U.S. Attorneys asserted Meshbesher had a conflict apparent on the record, and before they demanded Singer waive the conflict or they would move to disqualify Meshbesher, the U.S. Attorney had declined any perjury prosecution because there "were no substantial perjury allegations to prosecute." (See F.B.I. memo dated 9/6/-83).

After the U.S. Attorney came to that conclusion, he referred Johnson and the documents to the F.B.I. for review. On Sept. 2, 1983, Blay, the F.B.I. agent in charge of the Minneapolis office, advised the U.S. Attorney "there was no apparent indication of a Federal violation." (See F.B.I. memo dated 10/3/83; memo dated 9/6/-

83). Blay said that the documentation furnished by Johnson "does not appear to support his allegations that GILBERT SINGER committed perjury," but rather, "appear to support the testimony of GILBERT SINGER." (F.B.I. memo dated 9/6/83).

Further, Judge Lord was informed by the U.S. Attorney and the F.B.I. that the perjury accusations were baseless before he made prejudicial accusations in the press. (See F.B.I. memoranda dated 9/6/83, 9/8/83, 10/3/83).

One F.B.I. memorandum also indicates that Judge Lord had Johnson brief him, so Judge Lord could "brief Judge Murphy before the retrial." (See F.B.I. memo dated 9/8/83).

The Eisele Hearings

Because of Judge Lord's letter, Judge Murphy recused herself on the petitioner's motion, and Judge Thomas Eisele (E.D. Ark.) was designated to hear the

motion. He ruled that Judge Lord's misconduct did not warrant dismissal of the indictment. His rationale in denying the motion on that ground was that the government should not lose the right to prosecute an accused because of a judge's behavior (11/9/83, p. 11). He found, however, that Judge Lord "obviously felt the government attorneys were not adequately presenting certain issues" in the first trial (Id. at 10).

Judge Eisele expanded the hearing on prosecutorial misconduct and ordered Stoll's name disclosed to the defense (In camera 12/9/83, pp. 1-13). Stoll said that he showed Johnson the Singer defense file to prove he was not as deeply involved in the conspiracy as Gilbert Singer's testimony had indicated. However Stoll was not sure whether the stolen defense file would support his claim (12/ 14/83, pp. 67-70). Finally, Johnson told Stoll

he wanted all the documents from the defense file, not just those involving Gilbert Singer. Upon hearing this information, Asst. U.S. Attorney Schermer told Johnson to get the complete file.

Johnson further testified he initially took the file to the U.S. Attorney's office. After the U.S. Attorney refused to prosecute a perjury case, he went to Judge Lord (12/15/83, pp. 308-309). In this meeting Johnson showed Judge Lord a DEA report he prepared about the defense file (Id. at 308). He did not show Lord the documents. Johnson also testified that he was still investigating the perjury claim:

> Q: [By Mr. Meshbesher]:
> Didn't you want to find out who had given him my file?
> A: [By Sergeant Johnson]: Yes.
> Q: Why did you want to know that?
> A: They may be very good witnesses in my perjury investigation, Mr. Meshbesher.
> Q: You wanted to know how you

> could get to someone in my office, didn't you?
> A: I'm looking for further information to a perjury investigation, and I would be certainly happy to obtain evidence from anyone who would be willing to give it to me. (12/15/83, p. 328).

Judge Eisele Refuses to Order Disclosure of the Employee Who Stole the File, the Person Who Leaked the Story to the Press, And Whether the United States Actually Had an Active Perjury Investigation

Meshbesher tried to establish the chain of persons actually responsible for stealing the documents from his office, but Judge Eisele did now allow Stoll to be questioned about who had given him the documents. Thus, the leak in Meshbesher's office has never been uncovered (12/14/83, pp. 43, 118).

Meshbesher tried to establish who in the government leaked the story about the alleged perjury investigation to the press by questioning the reporter, but Judge Eisele sustained assertion of the reporter's privilege pursuant to United States

v. Criden, 633 F.2d 346 (3rd Cir. 1980), cert. denied, 101 S.Ct. 924 (1981).

Meshbesher also tried to establish that the United States had declined any perjury prosecution, but Judge Eisele sustained the U.S. Attorney assertion of "executive privilege". Thus the U.S. Attorney would not confirm or deny the existence of any investigation (12/15/83, pp. 413-416, 486).

The Eisele Findings and Remedy

Judge Eisele found that an objective person, reviewing the defense files would not come to the conclusion that Meshbesher had suborned perjury and that there was no reasonable basis for such a conclusion (12/16/83, pp. 28-29).

Judge Eisele, however, did rule that the government could receive attorney-client and work product documents protected by the sixth amendment if the person procuring them represented that they contain-

ed evidence of collateral crimes (12/21/-83, p. 6). He did not specify that either the attorney or the client had to be involved in the collateral crime (Stoll, significantly, had never made such a representation.) Because in this case the government accepted all the documents from the defense file, and not just the ones represented as containing evidence of collateral crimes, Judge Eisele held the government had purposefully and impermissibly intruded upon Singer's sixth amendment rights (Id. at 7-9).

Judge Eisele further stated that few, if any, of the documents contained evidence of perjury. He found, "The real evidence here of perjury by Gilbert Singer, if indeed there be any, is the anticipated contrary testimony of Mr. Stoll, assuming he is to be believed." (Id. at 7, 8-9).

Although Judge Eisele found the government did not intend to prejudice the attorney-client relationship between Meshbesher and Singer, he found there were "obvious adverse effects." He "condemned the leaking of information not truly based upon fact which of necessity would be harmful to Mr. Meshbesher and to his relationship with his client, Mr. Singer." (Id. at 18-19). Consequently, he stated "that law enforcement officials charged with the prosecution of the case ... improperly leaked information to the press which ... had the effect of interfering with the attorney-client relationship between Mr. Singer and Mr. Meshbesher ..." (Id. at 20). He further stated:

> [T]he perjury alluded to was supposed to have occurred in the first trial of this case, and the suggestion that such in fact occurred and that Meshbesher had a part in bringing it about can only be regarded

> as extremely prejudicial to the defendants in this case. (12/21/83, p. 19).

The Remedy

As a remedy, Judge Eisele ordered the government to return the defense file to the defendant, except "the documents which it specifically represents to the court contain evidence of perjury by Mr. Gilbert Singer or evidence of subornation" (12/16/83, p. 15). Second, he ordered that all government attorneys who had read the documents or discussed them could not participate in the retrial of the case (Id.). Third, he ordered Sgt. Johnson and all other law enforcement officers having any knowledge of the defense file never to mention, use, or refer to it while working with the attorney assigned to try the case.

The U.S. Attorney Retains Documents For The Alleged Perjury Investigation

Even though the U.S. Attorney and the F.B.I. concluded the file did not con-

tain evidence of perjury, the government retained five of the defense documents, thus creating the impression of an active investigation.

Judge Eisele's order allowed Sgt. Johnson, Sgt. Strauss, Marshall Stoll and Judge Murphy -- all persons who had read the documents -- to participate in the retrial of the case. The retrial was returned to Judge Murphy.

Finally, Judge Eisele, in regard to the inference with counsel of choice issue, concluded:

> But can it truly be argued that the adverse publicity has rendered Mr. Meshbesher's participation at the retrial untenable? Either a continuance or a transfer to another district for trial could, the Court suggests, solve the problem. (12/21/83, p. 23).

Judge Eisele never discussed the ethical dilemma the government had improperly created.

The Retrial

Before trial, Singer moved to reopen the hearing on prosecutorial and judicial misconduct and for a change of venue. Judge Murphy denied the motion. Singer further requested Judge Murphy to appoint Meshbesher as his counsel. She said that she normally does not allow counsel to withdraw in a criminal case, but felt it would not be "appropriate in any circumstances for the court to appoint Meshbesher in this case." (3/7/84, pp. 1-9). Meshbesher had made financial arrangements with Singer about legal fees before the stolen file issue arose; he did not withdraw because Singer lacked funds. Meshbesher told Judge Murphy that he could not represent Singer because of the threats of prosecution and because he could not guarantee the security of Singer's defense file, since he did not know which employee had copied the file (3/7/84, pp. 1-9).

Sergeant Johnson worked as case agent at the retrial and testified. Stoll testified to subjects that had been discussed in the defense files.

Immediately before trial, two of Singer's codefendants, Arturo Izquierdo and Oakley Cline, pled guilty after the government offered them plea bargains. They each received a six-month jail sentence, the same sentence Stoll had obtained. Judge Murphy accepted these plea bargains. Co-defendant Sazenski was acquitted in the trial. Co-defendant John Reynolds was sentenced to three years. Singer was convicted on two counts on June 12, 1984. On August 22, 1984, Judge Murphy sentenced him to two consecutive five-year terms for a total of 10 years.

The Opinion of the Eighth Circuit

In respect to the Sixth Amendment violation, the Eighth Circuit held that Judge Eisele's order was effective to elim-

inate "any demonstrable prejudice, or any substantial threat thereof" so a reversal or dismissal of the indictment was not appropriate under United States v. Morrison, 449 U.S. 361 (1981).

The Circuit Court used alternate holdings. First, the majority of the panel interpreted Judge Eisele's brief statement that Meshbesher's continued representation may not be untenable if the trial was continued or venue changed as a finding that no prejudice resulted from the government's claim. Without any analysis of the issue or the facts, the court subjected this conclusion to the clearly erroneous standard citing United States v. Costanzo, 740 F.2d 251, 254-55 (3rd Cir. 1984), cert. denied, 105 S.Ct. 3477 (1985).

Alternately, the court held:

> [E]ven if government officials' statements to the

> press did create in Meshbesher a conflict of interest requiring withdrawal, there is no claim that Singer's appointed counsel rendered ineffective assistance. We thus reject these arguments. (Emphasis added).

United States v. Singer, 785 F.2d at 236. The majority opinion did not contain any further discussion of Meshbesher's ethical duties.

Judge Bright dissented and stated:

> Against the background of the government's highly improper conduct, Meshbesher had no choice except to withdraw. In my opinion Judge Eisele's order did not serve as a curative for the government's misconduct.

Double Jeopardy

The court rejected the petitioner's double jeopardy plea, but recognized that although the "issue had percolated in the dicta through the several circuits, it has yet to be addressed by the Supreme Court." United States v. Singer, 785 F.2d 228 (8th Cir. 1986). The court also stated that

the issue was a "complicated and close question." Id. at 239-240.

The court did not resolve the legal issue because it did not believe Judge Lord's behavior manifested the intent required to implicate double jeopardy concerns.

Singer petitioned the Eighth Circuit for a rehearing en banc but the request was denied with Judges Lay, Arnold, and Heany dissenting.

REASONS FOR GRANTING THE WRIT

This case presents important, unsettled, recurring Constitutional questions. First, this Court has considered, but never answered, the question what is the proper standard for reviewing and remedying a wrongful deprivation of a criminal defendant's privately retained counsel of choice.

Second, this Court has never answered the question whether the Double Jeopardy Clause bars a retrial after a reversal for judicial misconduct, and if so, what is the proper standard to resolve such a claim. This case squarely presents both issues, and given the state of the law in the Circuit Courts, these issues are ripe for review in this Court.

I.

THE EIGHTH CIRCUIT'S OPINION REQUIRING A DEFENDANT TO DEMONSTRATE PREJUDICE TO OBTAIN RELIEF FROM THE WRONGFUL DENIAL OF HIS OR HER RIGHT TO COUNSEL OF CHOICE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AND, IN EFFECT, ELIM-

INATES THE RIGHT BY ELIMINATING THE REMEDY.

The right of a defendant to have a privately retained defense counsel of choice has repeatedly been recognized in the Circuit Courts of Appeals, e.g., United States v. Sheiner, 410 F.2d 337, 342 (2nd Cir. 1969); United States v. Laura, 607 F.2d 52 (3rd Cir. 1979); United States v. (Under Seal), 774 F.2d 624, 627 (4th Cir. 1985); Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); Wilson v. Mintzes, 761 F.2d 275, 284 (6th Cir. 1985) (comprehensive analysis); United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982); Releford v. United States, 288 F.2d 298 (9th Cir. 1961); United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

The right to privately retained defense counsel has also been repeatedly recognized by this Court, e.g., Powell v. Alabama, 287 U.S. 45 (1932); Glasser v. United States, 315 U.S. 60, 75 (1942);

Chandler v. Fretag, 248 U.S. 3,9 (1954); Crooker v. California, 357 U.S. 433, 439 (1958).

In the seminal case of Powell v. Alabama, the right to counsel of choice was established as a fundamental right secured by the constitutional guarantee to due process of law. 287 U.S. 647-71. Other cases have held the right to counsel of choice is also secured by the Sixth Amendment. Wilson v. Mintzes, 761 F.2d 275, 278 (6th Cir.); United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979).

In Laura, the court summarized its view on the right to privately retained counsel as follows:

> We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a de-

fense.

Defining the dimensions of the right to counsel of choice has spawned litigation, some of which has reached this Court. Morris v. Slappy, 461 U.S. 1 (1983); Flanagan v. United States, 465 U.S. 259 (1984) See also Richardson-Merrell v. Koller, 472 U.S.___, 86 L.Ed.2d 340 (1985) (dicta).

Despite this repeated recognition of the right, the United States, in Flanagan v. United States, 465 U.S. 259 (1983), took the official position that a criminal defendant does not have a constitutionally protected right to privately retained counsel of his or her choice. Brief For The United States at 38-41, Flanagan v. United States.

However, in Flanagan, the Court did not reach the issue whether a defendant has a right to privately retained counsel of choice, or the closely related issue of whether prejudice will be presumed from the wrongful denial of the right. The

Court refused to reach these issues and held that a pretrial disqualification of counsel was not an appealable order. Therefore, if a defendant is wrongly denied his or her privately retained counsel of choice, the deprivation must be reviewed from a judgment of conviction, obtained while the defendant was represented by other counsel. Thus, the standard of review applied is critical.

Generally, the question is whether prejudice will be presumed by a wrongful deprivation, or whether actual prejudice will have to be demonstrated.

In Richardson-Merrell v. Koller, 472 U.S. ___, 86 L. Ed.2d 340 (1985), Justice O'Connor wrote:

> This Court has never held that prejudice is a prerequisite to the reversal of a judgment following the the erroneous disqualification of counsel in either a civil or a criminal case.

Id. at 351.

Although this case does not involve a disqualification order, a wrongful interference with the right to counsel of choice stemming from governmental misconduct should be subject to the same standard because the same right is at stake.

How the right to counsel of choice will be protected is of great constitutional importance. This Court should decide this issue.

The Eighth Circuit Court of Appeals' decision in this case -- that even if Singer was wrongly denied his counsel of choice, the violation is harmless because he did not demonstrate his second counsel was ineffective -- eliminates the right to privately retained counsel of choice because it eliminates the remedy. Under this standard the only claim is ineffective assistance of counsel.

The Eighth Circuit's standard also conflicts with the opinions expressed by individual justices of this Court. Jus-

tice Stevens, in his dissent in the Richardson-Merrell case, specifically stated that prejudice should be presumed from a wrongful deprivation of a criminal defendant's counsel of choice. 472 U.S. at ___, 86 L.Ed.2d at 354. ("[I]n a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal ...").

In Morris v. Slappy, Justice Brennan's concurring opinion, which Justice Marshall joined, stated that the presumption of prejudice rule was the proper standard for reviewing wrongful interference with a defendant's counsel of choice. 461 U.S. at ___, 75 L.Ed. at 629. Justice Brennan explicitly rejected the ineffective assistance standard applied by the Eighth Circuit in this case. Id. at 629-30.

Most of the Circuit Courts conflict with the Eighth Circuit opinion in this case requiring a showing of actual preju-

dice to obtain a reversal for the wrongful interference with the right to counsel.

The Third Circuit held in United States v. Rankin, 779 F.2d 956 (1986), that a "defendant 'need not show that the dismissal' of counsel 'was prejudicial.'" Id. 961. See also United States v. Laura, 607 F.2d 52, 58 (3rd Cir. 1979) (same). Further, the Third Circuit explicitly rejected the harmless error standard enunciated by the Eighth Circuit:

> [T]he denial of one's selected lawyer is quite different from a claim of ineffective counsel where a harmless error test is appropriate. ... 'The right is either respected or denied; its deprivation cannot be harmless.' McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8 (1984).

779 F.2d at 960.

The Fifth Circuit, in Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978), has also held that prejudice is presumed from a wrongful interference with counsel of

choice. Id. at 1326. The Court in Gandy stated:

> [I]t is of no relevance that substitute counsel has not been shown to have performed incompetently or ineptly. The claimed deprivation is an aribitrary encroachment on the right to counsel of choice not a claim of ineffective assistance rendered in the performance by the substitute counsel. Id.

The rule in the Sixth Circuit is that "[e]vidence of unreasonable or arbitrary interference with an accused's right to counsel of choice ordinarily mandates reversal without a showing of prejudice." Wilson v. Mintzes, 761 F.2d 275, 281 (6th Cir. 1985) (contains a thorough review of circuit law). See also Linton v. Perini, 656 F.2d 207, 211-12 (6th Cir. 1981). The Sixth Circuit, too,explicitly rejected the ineffective assistance analysis adopted by the Eighth Circuit. 761 F.2d at 285.

The Ninth Circuit has repeatedly held that "denial of a criminal defendant's qualified right to retain counsel

of his choice is reversible error regardless whether prejudice is shown." United States v. Washington, 782 F.2d 807, 813 (9th Cir. 1986). See also United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) (same); United States v. Greger, 657 F.2d 1109, 1113 (9th Cir. 1981), cert. denied, 461 U.S. 913 (1983) (same); Releford v. United States, 288 F.2d 298, 301 (9th Cir. 1961) (same).

This Court should not be deterred from reviewing this case because of the Eighth Circuit's alternate holding that the petitioner's attorney was not "forced" to withdraw. Therefore he was not prejudiced.

First, alternate grounds for a holding are considered independent, and not dicta. See United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949). Thus, the court's alternate holding that Singer's Sixth Amendment

right was not violated "even if government officials' statements to the press did create a conflict of interest, requiring withdrawal, [because] there is no claim that Singer's appointed counsel rendered ineffective assistance," creates a precedent properly subject to review by this Court.

Second, Meshbesher withdrew. Therefore Singer lost his privately retained counsel of choice. This is not disputed. At no time has the good faith of his withdrawal been questioned. Indeed, as shown above, Judge Murphy did not feel it was "appropriate in any circumstance" to allow Meshbesher to continue as Singer's counsel, even though Singer requested it.

Third, Meshbesher clearly had an ethical duty to withdraw because of the false criminal accusations being made against him.

Judge Eisele's order, which focused only on the impact of the prejudicial pub-

licity, did not address Meshbesher's ethical duties. In fact, Eisele's order further interfered with Meshbesher's representation of Singer because it allowed the government to retain parts of the stolen file for the alleged collateral perjury investigation thus making the threat of prosecution appear real. Then, the government did in fact retain documents.

However, the F.B.I. memoranda make clear that prior to retaining these documents, the U.S. Attorney and the F.B.I. had determined that the documents did not support any perjury charge.

Fourth, Meshbesher could not assure Singer his future confidences would be kept because Judge Eisele did not order the government to disclose which employee in Meshbesher's office stole the file. The government did not voluntarily disclose the person's name. This was an intolerable situation given a lawyer's ethi-

cal duty to keep his client's confidences and secrets.

Finally, the Eighth Circuit also did not address Meshbesher's ethical duty to withdraw. The Eighth Circuit completely ignores that the Assistant U.S. Attorneys demanded that Singer waive the conflict they believed "apparent on the record" or they would move to disqualify Meshbesher. The Eighth Circuit's opinion concludes that Meshbesher did not have to withdraw, but never analyzes whether a conflict developed from the baseless accusations of subornation of perjury that would impair his zealous and loyal representation of Singer at trial. The Circuit Court's decision permits the government, through gross misconduct, to force a defendant to elect between conflict-free representation and the right to counsel of choice.

In Wood v. Georgia, 450 U.S. 261, 271 (1981) this Court wrote:

> Where the constitutional right to counsel exists, our Sixth

> Amendment cases hold that there is a cordrelative right to representation that is free from all conflicts of interests.

Where a defendant is entitled to a number of rights, he is entitled to all such rights and cannot be forced to barter one for the other. When the exercise of one right is made contingent on forbearance of another, both rights are corrupted. United States Ex Rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3rd Cir. 1977). Singer was entitled to counsel of his choice and conflict-free representation. The government made one right contingent upon forbearance of the other by falsely accusing Meshbesher of suborning perjury.

The Eighth Circuit's Use of the Clearly Erroneous Standard in Reviewing Meshbesher's Ethical Duties Conflicts with the Approach Used by Other Circuits

The Eighth Circuit's failure to independently assess Meshbesher's ethical duties towards his client raises a subsidiary, but critically important question concerning the proper standard for review-

ing claimed interferences with a defendant's counsel of choice. The issue this presents is whether the clearly erroneous test applies not only to the facts found by the trial court concerning the ethical duties, but also to the application of the ethical standards to the facts as found. The circuit courts are in conflict on this issue and this Court has never addressed it.

In United States v. Hobson, 672 F.2d 825 (11th Cir. 1982), cert. denied, 459 U.S. 906, the Eleventh Circuit held that the proper standard of review was to apply the clearly erroneous test to issues of fact, but independently apply the ethical standards to those facts. (It is significant to note that in Hobson, the attorney was disqualified to avoid the appearance of impropriety because of alleged personal knowledge of some of the criminal activity which was the subject of the case. The court felt the attorney's credibility may

become an issue before the jury. This is similar to the situation Meshbesher was in, except the appearance of impropriety was improperly created by the government and Judge Lord).

The Eleventh Circuit's position on the independent standard of review has been followed by the Seventh Circuit in Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (11th Cir. 1982) and the Fifth Circuit in United States v. Snyder, 707 F.2d 139, 144 (5th Cir. 1983).

This approach directly conflicts with the Eighth Circuit's refusal to independently analyze whether Meshbesher's ethical duties, applied to the facts as found, forced him to withdraw.

The application of the clearly erroneous test to the overall issue dilutes the right to privately retained counsel of choice. This Court should accept this case and clarify the standard because it presents an unanswered, important recur-

ring question that is vitally connected to the fundamental constitutional right to privately retained counsel of choice.

II.

THE DOUBLE JEOPARDY ISSUES IN THIS CASE ARE IMPORTANT AND UNRESOLVED.

This case presents questions concerning the law of double jeopardy that are of great importance to the administration of criminal justice. First, does the Double Jeopardy Clause bar retrial of a defendant after his conviction is reversed for judicial misconduct. This Court has never specifically addressed the issue of whether a reversal, as opposed to a mistrial, in this context may create a double jeopardy bar.

Second, a subsidiary question presented is what is the proper standard for resolving a double jeopardy claim based on judicial misconduct.

In United States v. Dinitz, 424 U.S. 600 (1976), the defendant made an unop-

posed motion for a mistrial after the trial judge excluded his attorney from the courtroom for misconduct in his opening statement. The defendant was retried and convicted. On appeal he argued that his retrial was barred by the Double Jeopardy Clause. This Court disagreed because the mistrial was "not attributable to prosecutorial or judicial overreaching." 424 U.S. at 607. The Court, however, stated that the Double Jeopardy Clause

> bars retrial where 'bad faith conduct by judge or prosecutor' ... threatens the '[h]arrassment by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict.' Id. at 611.

The Court applying that reasoning to the case stated that the Double Jeopardy Clause did not bar the retrial since the judge's banishment of the attorney

> was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal. Id. (emphasis added).

To the credit of the federal judiciary, there is a dearth of case law concerning intentional judicial misconduct. However, this Court has stated that if "judicial impropriety justifying a mistrial resulted from the fear the jury was likely to acquit the accused" the Double Jeopardy Clause would bar the retrial of the defendant. United States v. Tateo, 377 U.S. 463, 468 fn. 3; see also United States v. Jorn, 400 U.S. 470, 485 fn. 12.

The government in this case has argued that Oregon v. Kennedy, 456 U.S. 667 renounced the language of the above cases and applied a stricter standard. Further, they have argued that only prosecutorial misconduct intended to provoke a mistrial can raise a double jeopardy bar. This contention is inconsistent with the protections intended to be secured by the clause and the reasoning of the Kennedy case.

In Kennedy, this Court reviewed a case involving prosecutorial misconduct and found that the "bad faith" and "harassment" contained in the above formulations could not be applied in the context of prosecutorial misconduct. The court reasoned:

> The difficulty with the more general standards which would permit a broader exception than one merely based on intent is that they offer virtually no standards for their application. Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt.
>
> * * *
>
> Prosecutorial conduct that might be viewed as harassment or overreaching , even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. Id. at 675 (emphasis added).

The Court's rationale in Oregon v. Kennedy, supra, simply does not apply in the context of judicial misconduct since

every act on the part of the judge is not -- or should not be -- designed to prejudice the defendant. Therefore the problems inherent in applying the broader standard are not present in the context of judicial misconduct. This Court should resolve this question. The Eighth Circuit's opinion improperly failed to reach it.

Howewver, even if the stricter is applied, Lord violated it in this case.

Judge Lord's conduct clearly indicates that he deliberately acted during the defendant's first trial to avoid an acquittal. From the beginning of the trial, Judge Lord felt that Asst. U.S. Attorney Schermer was being overwhelmed by the defense. When Lord requested a second prosecutor and the U.S. Attorney refused to send another attorney, Lord stated "I am not going to try the government's case for it, like I've been doing up to this time." 710 F.2d at 433. At one point,

Judge Lord even told the jury that Schermer was overwhelmed and indicated that the government may not get in evidence and lose the trial as a result. Id. at 435.

Judge Arnold, writing for this Court en banc in reversing the appellant's first conviction, stated:

> On the whole, it seems clear to us that the court believed the evidence of the defendant's guilt was strong, but that the case was a complicated one, and that justice might not be done if the government counsel were left to his own devices. Id. at 436.

The en banc panel also specifically held that the error in the first trial was not harmless error. The court stated:

> [W]e have considered the trial court's conduct in the context of all the evidence and we cannot say that there is no reasonable possibility that the practice complained of might have contributed to the conviction. Id. at 437.

Judge Arnold implicitly recognized that Judge Lord feared an acquittal. Nevertheless, Judge Arnold stated that the case

did not involve "actual bias on the part of the trial judge." Id. at 423. However, Judge Arnold and the en banc Court had not been aware of the extent of Judge Lord's misconduct.

A number of incidents of Judge Lord's misconduct uncovered or committed after the reversal demonstrate his bad faith, if not actual bias and compel the inference that he intentionally worked to avoid an acquittal in the first trial. First, Lord's statement to the press that "People shouldn't be found innocent because of a disparity of their representation," shows that he feared the defendants would be acquitted in the first trial and that he actively worked to avoid that result. Both the Eighth Circuit's opinion and Judge Eisele's order implicitly acknowledges this.

Second, the ex parte contact with Judge Lord initiated with Schermer and his request that Schermer bolster the record

for appeal was clearly intended to secure the convictions. The Eighth Circuit was not aware of this incident on the first appeal. This incident shows that Judge Lord's conduct during the trial was intentional and motivated by fear of an acquittal.

Third, Judge Lord's speculation with Schermer and Johnson about whether missing witnesses were dead or alive was highly inappropriate since it was ex parte and before Judge Lord sentenced the appellant. Again, this provides further insight into the deliberateness of Judge Lord's conduct.

Fourth, Judge Lord's statements to the press suggesting that the defendant's counsel -- and inferentially the defendant -- suborned perjury fits into a general pattern of deliberate misconduct simply extending from the first trial.

Finally, Judge Lord in his letter to Judge Murphy wrote: "It has been my experi-

ence that defense counsel in criminal cases are much more interested in questions than answers." (A. 26). This remark is further evidence supporting the claim that Lord was actually biased against the defendants and prejudiced them in the first trial. The defendant's first trial in this case was marred not only by error, but by Judge Lord's deliberate and intentional error aimed at avoiding acquittal and securing conviction. This conduct allowed the government to determine the strength and weaknesses of the defendant's case for the retrial. The government gained an opportunity to garner more evidence against him which it effectively utilized since in the retrial three former co-defendants were given lenient plea bargains in exchange for their testimony against him.

At this point, it is impossible to intelligently determine what impact Lord's misconduct had on the first trial. The defendant was acquitted on one count of

the indictment in that trial. Perhaps the jury would have acquitted on all counts but for Judge Lord's misconduct.

If judicial misconduct will ever lead to a double jeopardy bar, it should in this case. This Court should accept the case for review to clarify the standard for resolving a double jeopardy claim based on judicial misconduct.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests this Court to grant the writ.

MESHBESHER, SINGER &
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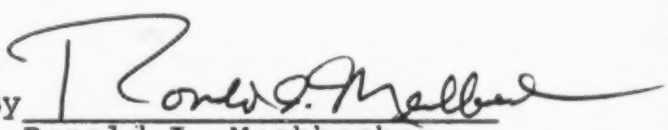
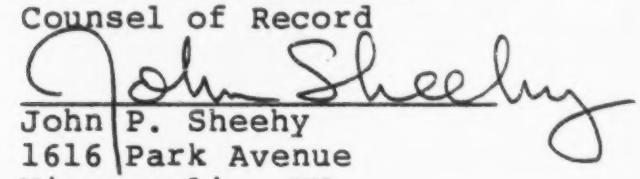
By 
Ronald I. Meshbesher
Counsel of Record


John P. Sheehy
1616 Park Avenue
Minneapolis, MN
(612) 339-9121

July 19, 1986 COUNSEL FOR PETITIONER